

## SENATE BILL No. 308

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### DIGEST OF INTRODUCED BILL

**Citations Affected:** IC 13-11-2; IC 13-12-7; IC 32-20-3-2; IC 32-23-10-4.

**Synopsis:** Uniform environmental covenants act. Adopts the uniform environmental covenants act to establish rules for a perpetual interest in real estate (an environmental covenant) to regulate the use of contaminated real property transferred from one owner to another. Makes conforming amendments.

**Effective:** July 1, 2009.

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January 7, 2009, read first time and referred to Committee on Energy and Environmental Affairs.

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Introduced

First Regular Session 116th General Assembly (2009)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type~~.

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~this style type~~ reconciles conflicts between statutes enacted by the 2008 Regular Session of the General Assembly.

## SENATE BILL No. 308

A BILL FOR AN ACT to amend the Indiana Code concerning environmental law.

*Be it enacted by the General Assembly of the State of Indiana:*

- 1 SECTION 1. IC 13-11-2-1.2 IS ADDED TO THE INDIANA CODE
- 2 AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE JULY
- 3 1, 2009]: **Sec. 1.2. "Activity and use limitations", for purposes of**
- 4 **IC 13-12-7, means restrictions or obligations created under that**
- 5 **chapter with respect to real property.**
- 6 SECTION 2. IC 13-11-2-2.5 IS ADDED TO THE INDIANA CODE
- 7 AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE JULY
- 8 1, 2009]: **Sec. 2.5. "Agency", for purposes of IC 13-12-7, means the**
- 9 **department or any other state or federal agency that determines or**
- 10 **approves an environmental response project under which an**
- 11 **environmental covenant is created.**
- 12 SECTION 3. IC 13-11-2-35.2 IS ADDED TO THE INDIANA
- 13 CODE AS A **NEW** SECTION TO READ AS FOLLOWS
- 14 [EFFECTIVE JULY 1, 2009]: **Sec. 35.2. "Common interest**
- 15 **community", for purposes of IC 13-12-7, means a condominium, a**
- 16 **cooperative, or other real property with respect to which a person,**
- 17 **by virtue of the person's ownership of a parcel of real property or**

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1 another real property interest, is obligated to pay property taxes  
 2 or insurance premiums or pay for maintenance or improvement of  
 3 other real property described in a recorded covenant that creates  
 4 the community.

5 SECTION 4. IC 13-11-2-69.5 IS ADDED TO THE INDIANA  
 6 CODE AS A **NEW** SECTION TO READ AS FOLLOWS  
 7 [EFFECTIVE JULY 1, 2009]: **Sec. 69.5. "Environmental covenant",**  
 8 **for purposes of IC 13-12-7, means a servitude arising under an**  
 9 **environmental response project that imposes activity and use**  
 10 **limitations.**

11 SECTION 5. IC 13-11-2-71, AS AMENDED BY P.L.137-2007,  
 12 SECTION 5, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE  
 13 JULY 1, 2009]: Sec. 71. "Environmental management laws" refers to  
 14 the following:

- 15 (1) IC 13-12-2, ~~and~~ IC 13-12-3, **and IC 13-12-7.**
- 16 (2) IC 13-13.
- 17 (3) IC 13-14.
- 18 (4) IC 13-15.
- 19 (5) IC 13-16.
- 20 (6) IC 13-17-3-15, IC 13-17-8-10, IC 13-17-10, and IC 13-17-11.
- 21 (7) IC 13-18-12, IC 13-18-13-31, and IC 13-18-15 through
- 22 IC 13-18-20.
- 23 (8) IC 13-19-1, IC 13-19-4, and IC 13-19-5-17.
- 24 (9) IC 13-20-1, IC 13-20-2, IC 13-20-4 through IC 13-20-15,
- 25 IC 13-20-17.7, IC 13-20-19 through IC 13-20-21, and
- 26 IC 13-20-22-21.
- 27 (10) IC 13-22.
- 28 (11) IC 13-23.
- 29 (12) IC 13-24.
- 30 (13) IC 13-25-1 through IC 13-25-5.
- 31 (14) IC 13-27-8.
- 32 (15) IC 13-30, except IC 13-30-1.

33 SECTION 6. IC 13-11-2-71.5 IS ADDED TO THE INDIANA  
 34 CODE AS A **NEW** SECTION TO READ AS FOLLOWS  
 35 [EFFECTIVE JULY 1, 2009]: **Sec. 71.5. "Environmental response**  
 36 **project", for purposes of IC 13-12-7, means a plan or work**  
 37 **performed for environmental remediation of real property and**  
 38 **conducted:**

- 39 (1) **under a federal or state program governing environmental**  
 40 **remediation of real property, including:**
  - 41 (A) IC 13-14-2;
  - 42 (B) IC 13-19-5;

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- (C) IC 13-22-13;
- (D) IC 13-23-13; and
- (E) IC 13-30-3;

(2) incident to closure of a solid or hazardous waste management unit, if the closure is conducted with approval of an agency; or

(3) under the voluntary remediation program authorized under IC 13-25-5.

SECTION 7. IC 13-11-2-102.2 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2009]: **Sec. 102.2. "Holder", for purposes of IC 13-12-7, means the grantee of an environmental covenant as specified in IC 13-12-7-2(a).**

SECTION 8. IC 13-11-2-158, AS AMENDED BY P.L.137-2007, SECTION 6, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2009]: **Sec. 158. (a) "Person", for purposes of:**

- (1) IC 13-21;
- (2) air pollution control laws;
- (3) water pollution control laws; and
- (4) environmental management laws, except as provided in subsections (c), (d), (e), and (h);

means an individual, a partnership, a copartnership, a firm, a company, a corporation, an association, a joint stock company, a trust, an estate, a municipal corporation, a city, a school city, a town, a school town, a school district, a school corporation, a county, any consolidated unit of government, political subdivision, state agency, a contractor, or any other legal entity.

(b) "Person", for purposes of:

- (1) IC 13-18-10; and
- (2) IC 13-20-17;

means an individual, a partnership, a copartnership, a firm, a company, a corporation, an association, a joint stock company, a trust, an estate, a political subdivision, a state agency, or other legal entity, or their legal representative, agent, or assigns.

(c) "Person", for purposes of:

- (1) IC 13-20-13;
- (2) IC 13-20-14;
- (3) IC 13-20-16; and
- (4) IC 13-25-6;

means an individual, a corporation, a limited liability company, a partnership, or an unincorporated association.

(d) "Person", for purposes of IC 13-23, has the meaning set forth in

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subsection (a). The term includes a consortium, a joint venture, a commercial entity, and the United States government.

(e) "Person", for purposes of IC 13-20-17.5 and IC 13-25-3, means an individual, a corporation, a limited liability company, a partnership, a trust, an estate, or an unincorporated association.

(f) "Person", for purposes of IC 13-26, means an individual, a firm, a partnership, an association, a limited liability company, or a corporation other than an eligible entity.

(g) "Person", for purposes of IC 13-29-1, means any individual, corporation, business enterprise, or other legal entity either public or private and any legal successor, representative, agent, or agency of that individual, corporation, business enterprise, or legal entity.

(h) "Person", for purposes of IC 13-30-8-1, has the meaning set forth in IC 35-41-1.

**(i) "Person", for purposes of IC 13-12-7, means an individual, a corporation, a business trust, an estate, a trust, a partnership, a limited liability company, an association, a joint venture, a public corporation, a government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.**

SECTION 9. IC 13-11-2-164 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2009]: Sec. 164. (a) "Political subdivision", for purposes of IC 13-18-13, means:

- (1) a political subdivision (as defined in IC 36-1-2);
- (2) a regional water, sewage, or solid waste district organized under:

(A) IC 13-26; or

(B) IC 13-3-2 (before its repeal July 1, 1996); or

- (3) a local public improvement bond bank organized under IC 5-1.4.

(b) "Political subdivision", for purposes of **IC 13-12-7 and IC 13-18-21**, means:

- (1) a political subdivision (as defined in IC 36-1-2);
- (2) a regional water, sewage, or solid waste district organized under:

(A) IC 13-26; or

(B) IC 13-3-2 (before its repeal July 1, 1996);

- (3) a local public improvement bond bank organized under IC 5-1.4;

(4) a qualified entity described in IC 5-1.5-1-8(4) that is a public water utility described in IC 8-1-2-125; or

- (5) a conservancy district established for the purpose set forth in IC 14-33-1-1(a)(4).

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(c) "Political subdivision", for purposes of IC 13-19-5, has the meaning set forth in IC 36-1-2-13 and includes a redevelopment district under IC 36-7-14 or IC 36-7-15.1.

SECTION 10. IC 13-11-2-178.5 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2009]: **Sec. 178.5. "Record", used as a noun, for purposes of IC 13-12-7, means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.**

SECTION 11. IC 13-11-2-219 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2009]: Sec. 219. "State", for purposes of **IC 13-12-7** and IC 13-29-1, means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, or any other territorial possession of the United States.

SECTION 12. IC 13-12-7 IS ADDED TO THE INDIANA CODE AS A NEW CHAPTER TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2009]:

**Chapter 7. Uniform Environmental Covenants Act**

**Sec. 1. This chapter may be cited as the Uniform Environmental Covenants Act.**

**Sec. 2. (a) Any person, including:**

- (1) a person that owns an interest in the real property subject to an environmental covenant;**
- (2) the agency; or**
- (3) a political subdivision;**

**may be a holder. An environmental covenant may identify more than one (1) holder. The interest of a holder is an interest in real property.**

**(b) A right of an agency under this chapter or under an environmental covenant, other than a right as a holder, is not an interest in real property.**

**(c) An agency is bound by any obligation it assumes in an environmental covenant, but an agency does not assume obligations merely by signing an environmental covenant. Any other person that signs an environmental covenant is bound by the obligations the person assumes in the covenant, but signing the covenant does not change obligations, rights, or protections granted or imposed under law other than this chapter except as provided in the environmental covenant.**

**(d) The following rules apply to interests in real property in existence at the time an environmental covenant is created or amended:**

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(1) An interest that has priority under law other than this chapter is not affected by an environmental covenant unless the person that owns the interest subordinates that interest to the environmental covenant.

(2) This chapter does not require a person that owns a prior interest to subordinate that interest to an environmental covenant or to agree to be bound by the environmental covenant.

(3) A subordination agreement may be contained in an environmental covenant covering real property or in a separate record. If the environmental covenant covers commonly owned property in a common interest community, the record may be signed by any person authorized by the governing board of the owners' association.

(4) An agreement by a person to subordinate a prior interest to an environmental covenant affects the priority of that person's interest but does not by itself impose any affirmative obligation on the person with respect to the environmental covenant.

**Sec. 3. (a) An environmental covenant must:**

(1) state that the instrument is an environmental covenant executed under this chapter;

(2) contain a legally sufficient description of the real property subject to the covenant;

(3) describe the activity and use limitations on the real property;

(4) identify every holder;

(5) be signed by the agency, every holder, and, unless waived by the agency, every owner in fee simple of the real property subject to the covenant; and

(6) identify the name and location of any administrative record for the environmental response project reflected in the environmental covenant.

(b) In addition to the information required by subsection (a), an environmental covenant may contain other information, restrictions, and requirements agreed to by the persons that signed the environmental covenant, including any:

(1) requirements for:

(A) notice:

(i) following transfer of a specified interest in; or

(ii) concerning proposed changes in use of;

(B) applications for building permits for; or

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(C) proposals for any site work affecting the contamination on;

the property subject to the covenant;

(2) requirements for periodic reporting describing compliance with the environmental covenant;

(3) rights of access to the property granted in connection with implementation or enforcement of the environmental covenant;

(4) brief narrative description of the contamination and remedy, including the contaminants of concern, the pathways of exposure, limits on exposure, and the location and extent of the contamination;

(5) limitation on amendment or termination of the environmental covenant in addition to the limitations contained in sections 8 and 9 of this chapter; and

(6) rights of the holder in addition to its right to enforce the covenant under section 10 of this chapter.

(c) In addition to other conditions for its approval of an environmental covenant, the agency may require those persons specified by the agency who have interests in the real property to sign the environmental covenant.

Sec. 4. (a) An environmental covenant that complies with this chapter runs with the land.

(b) An environmental covenant that is otherwise effective is valid and enforceable even if:

(1) it is not appurtenant to an interest in real property;

(2) it can be or has been assigned to a person other than the original holder;

(3) it is not of a character that has been recognized traditionally at common law;

(4) it imposes a negative burden;

(5) it imposes an affirmative obligation on a person having an interest in the real property or on the holder;

(6) the benefit or burden does not touch or concern real property;

(7) there is no privity of estate or contract;

(8) the holder dies, ceases to exist, resigns, or is replaced; or

(9) the owner of an interest subject to the environmental covenant and the holder are the same person.

(c) An instrument that creates restrictions or obligations with respect to real property that would qualify as activity and use limitations except for the fact that the instrument was recorded

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before July 1, 2009, is not invalid or unenforceable:

(1) because of any of the limitations on enforcement of interests described in subsection (b); or

(2) because the instrument was identified as an easement, servitude, deed restriction, or other interest.

(d) This chapter does not apply to an instrument described in subsection (c) except as provided in subsection (c).

(e) This chapter does not invalidate or render unenforceable any interest, whether designated as an environmental covenant or as another interest, that is otherwise enforceable under Indiana law.

**Sec. 5.** An environmental covenant may prohibit or restrict uses of real property that are authorized by zoning or by law other than this chapter. This chapter does not authorize a use of real property that is otherwise prohibited:

(1) by zoning;

(2) by law other than this chapter regulating use of real property; or

(3) by a recorded instrument that has priority over the environmental covenant.

**Sec. 6. (a)** A copy of an environmental covenant shall be provided by the persons and in the manner required by the agency to:

(1) each person that signed the environmental covenant;

(2) each person holding a recorded interest in the real property subject to the environmental covenant;

(3) each person in possession of the real property subject to the environmental covenant;

(4) each political subdivision in which real property subject to the environmental covenant is located; and

(5) any other person the agency requires.

(b) The validity of a covenant is not affected by failure to provide a copy of the environmental covenant as required under this section.

**Sec. 7. (a)** An environmental covenant and any amendment or termination of the environmental covenant must be recorded in every county in which any part of the real property subject to the environmental covenant is located. For purposes of indexing, a holder shall be treated as a grantee.

(b) Except as otherwise provided in section 8(c) of this chapter, an environmental covenant is subject to Indiana law governing recording and priority of interests in real property.

**Sec. 8. (a)** An environmental covenant is perpetual unless it is:

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(1) by its terms limited to a specific duration or terminated by the occurrence of a specific event;

(2) terminated by consent under section 9 of this chapter;

(3) terminated under subsection (b);

(4) terminated by foreclosure of an interest that has priority over the environmental covenant; or

(5) terminated or modified in an eminent domain proceeding, but only if:

(A) the agency that signed the environmental covenant is a party to the proceeding;

(B) all persons identified in section 9(a) and 9(b) of this chapter are given notice of the pendency of the proceeding; and

(C) the court determines, after hearing, that the termination or modification will not adversely affect human health or the environment.

(b) If the agency that signed an environmental covenant has determined that the intended benefits of the environmental covenant can no longer be realized, a court, under the doctrine of changed circumstances, in an action in which all persons identified in section 9(a) and 9(b) of this chapter have been given notice, may terminate the environmental covenant or reduce its burden on the real property subject to the environmental covenant. The agency's determination or its failure to make a determination upon request is subject to review under IC 4-21.5.

(c) Except as otherwise provided in subsections (a) and (b), an environmental covenant may not be extinguished, limited, or impaired through:

(1) issuance of a tax deed;

(2) foreclosure of a tax lien; or

(3) application of the doctrine of adverse possession, prescription, abandonment, waiver, lack of enforcement, or acquiescence, or a similar doctrine.

(d) An environmental covenant may not be extinguished, limited, or impaired by application of IC 32-20-3 or IC 32-23-10.

Sec. 9. (a) An environmental covenant may be amended or terminated by consent only if the amendment or termination is signed by:

(1) the agency;

(2) unless waived by the agency, the current owner in fee simple of the real property subject to the covenant;

(3) each person that originally signed the covenant, unless:

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(A) the person waived in a signed record the right to consent; or

(B) a court finds that the person no longer exists or cannot be located or identified with the exercise of reasonable diligence; and

(4) except as otherwise provided in subsection (d)(2), the holder.

(b) If an interest in real property is subject to an environmental covenant, the interest is not affected by an amendment of the environmental covenant unless the current owner of the interest consents to the amendment or has waived in a signed record the right to consent to amendments.

(c) Except for an assignment undertaken under a governmental reorganization, assignment of an environmental covenant to a new holder is an amendment.

(d) Except as otherwise provided in an environmental covenant:

(1) a holder may not assign its interest without consent of the other parties;

(2) a holder may be removed and replaced by agreement of the other parties specified in subsection (a); and

(3) a court with jurisdiction may fill a vacancy in the position of holder.

**Sec. 10. (a) A civil action for injunctive or other equitable relief for violation of an environmental covenant may be maintained by:**

(1) a party to the environmental covenant;

(2) the agency;

(3) any person to whom the environmental covenant expressly grants power to enforce;

(4) a person whose interest in the real property or whose collateral or liability may be affected by the alleged violation of the environmental covenant; or

(5) a political subdivision in which the real property subject to the environmental covenant is located.

(b) This chapter does not limit the regulatory authority of the agency under law other than this chapter with respect to an environmental response project.

(c) A person is not responsible for or subject to liability for environmental remediation solely because the person has the right to enforce an environmental covenant.

**Sec. 11. (a) The department shall establish and maintain a registry that contains all environmental covenants and any amendment or termination of those environmental covenants. The**

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registry may also contain any other information concerning environmental covenants and the real property subject to them that the department considers appropriate. The registry is a public record for purposes of IC 5-14-3.

(b) After an environmental covenant or an amendment or termination of an environmental covenant is filed in the registry established and maintained under subsection (a), a notice of the environmental covenant or of the amendment or termination of the environmental covenant that complies with this section may be recorded in the land records instead of recording the entire environmental covenant. Any such notice must contain:

(1) a legally sufficient description and any available street address of the real property subject to the environmental covenant;

(2) the name and address of the owner of the fee simple interest in the real property, the agency, and the holder if other than the agency;

(3) a statement that the environmental covenant or the amendment or termination is available in a registry at the office of the department in Indianapolis, and a disclosure of the method of any electronic access; and

(4) a statement that the notice is notification of an environmental covenant executed under this chapter.

(c) A statement in substantially the following form, executed with the same formalities as a deed in Indiana, satisfies the requirements of subsection (b):

"1. This notice is filed in the land records of \_\_\_\_\_ County (insert name of county in which the real property is located) under IC 13-12-7-11.

2. This notice and the covenant, amendment, or termination to which it refers may impose significant obligations with respect to the property described below.

3. A legal description of the property is attached as Exhibit A to this notice. The address of the property that is subject to the environmental covenant is \_\_\_\_\_ (insert address of property or "not available").

4. The name and address of the owner of the fee simple interest in the real property on the date of this notice is \_\_\_\_\_ (insert name of current owner of the property and the owner's current address as shown on the tax records of the county in which the property is located).

5. The environmental covenant, amendment, or termination

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was signed by \_\_\_\_\_ (insert name and address of the agency).

6. The environmental covenant of the amendment or termination of the environmental covenant was filed in the registry on \_\_\_\_\_ (insert date of filing).

7. The full text of the environmental covenant or the amendment or termination and any other information required by the agency is on file and available for inspection and copying in the registry maintained for that purpose by the department at the office of the department in Indianapolis."

Sec. 12. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

Sec. 13. This chapter modifies, limits, or supersedes the federal Electronic Signatures in Global and National Commerce Act (15 U.S.C. 7001 et seq.) but does not modify, limit, or supersede Section 101 of that act (15 U.S.C. 7001(a)) or authorize electronic delivery of any of the notices described in Section 103 of that act (15 U.S.C. 7003(b)).

SECTION 13. IC 32-20-3-2, AS AMENDED BY P.L.18-2008, SECTION 2, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2009]: Sec. 2. Marketable record title is subject to the following:

(1) All interests and defects that are inherent in the muniments of which the chain of record title is formed. However, a general reference in the muniments, or any one (1) of them, to:

(A) easements;

(B) use restrictions; or

(C) other interests created before the root of title;

is not sufficient to preserve them, unless specific identification is made in the muniments of a recorded title transaction that creates the easement, use restriction, or other interest.

(2) All interests preserved by:

(A) the filing of proper notice; or

(B) possession by the same owner continuously for at least fifty (50) years, in accordance with IC 32-20-4-1.

(3) The rights of any person arising from adverse possession or adverse user, if the period of adverse possession or adverse user was wholly or partly subsequent to the effective date of the root of title.

(4) Any interest arising out of a title transaction recorded after the

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effective date of the root of title from which the unbroken chain of title of record is started. However, the recording shall not revive or give validity to any interest that has been extinguished before the time of the recording by the operation of section 3 of this chapter.

(5) The exceptions stated in IC 32-20-4-3 concerning:

(A) rights of reversioners in leases;

(B) rights of any lessee in and to any lease; and

(C) easements and interests in the nature of easements.

(6) All interests of the department of environmental management arising from the recording of a restrictive covenant under IC 13.

**(7) An environmental covenant under IC 13-12-7.**

SECTION 14. IC 32-23-10-4 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2009]: Sec. 4. (a) The statement of claim under section 2 of this chapter must:

(1) be filed by the owner of the mineral interest before the end of the twenty (20) year period set forth in section 2 of this chapter; and

(2) contain:

(A) the name and address of the owner of the mineral interest; and

(B) a description of the land on or under which the mineral interest is located.

(b) A statement of claim described in subsection (a) must be filed in the office of the recorder of deeds in the county in which the land is located.

(c) Upon the filing of a statement of claim within the time provided in this section, the mineral interest is considered to be in use on the date the statement of claim is filed.

**(d) A statement of claim described in subsection (a) does not extinguish, limit, or impair an environmental covenant under IC 13-12-7.**

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